

March 5, 1997

**Advisory Opinion 1997 - No. 3
Pre-Appointment Mailings**

The Board received a request for an advisory opinion from Senator Ken Jacobsen. Senator Jacobsen seeks clarification of the application of the mailing restrictions to mailings sent by a legislator who, although at the time of the mailing was a sitting legislator and not a candidate for office, is later appointed to fill the unexpired term of another legislative seat and does thereby become a candidate for office. Senator Jacobsen waived the confidentiality of his request.

FACTS

On January 6, 1997, Senator Jacobsen was appointed by the King County Council and sworn in as a member of the Senate representing the 46th District. Prior to that date, he was a member of the House of Representatives representing the same district. In December of 1996, Representative Jacobsen mailed a set of identical meeting notices. The December mailing had been prepared in November of 1996. The December mailing is considered a newsletter under the mailing restrictions.

On December 3, 1996, the Senator from the 46th District, Senator Nita Rinehart, announced that she would resign her position. At the time the December mailing was sent, Representative Jacobsen was aware of Senator Rinehart's resignation, but no successor had been named. The process of appointing Senator Rinehart's successor did not conclude until the day Senator Jacobsen was sworn in, January 6, 1997.

QUESTION

Do the mailings of a legislator who, at the time, is not a candidate for office count against the total number of mailings allowed during the 12-month period of the mailing restrictions of RCW 42.17.132 where the legislator is later appointed to serve the unexpired term of another legislative seat and, thereby, becomes a candidate for office in the last 12 months of his or her term?

OPINION

Under the circumstances, we conclude that the December mailing does not count as one of Senator Jacobsen's allowed mailings under the mailing restrictions of RCW 42.17.132.

ANALYSIS

The mailing restrictions of RCW 42.17.132 provide, in pertinent part, as follows:

During the twelve-month period preceding the last day for certification of the election results for a state legislator's election to office, the legislator may not mail to a constituent at public expense a letter, newsletter, brochure, or other piece of literature except as provided in this section.

The legislator may mail one mailing no later than thirty days after the start of

a regular legislative session and one mailing no later than sixty days after the end of a regular legislative session of identical newsletters to constituents.

...

RCW 42.17.132. These mailing restrictions do not contemplate the type of situation involved in this case, where one member moves from one legislative position to another. To the extent that it does not contemplate this situation, the statute is ambiguous. In order to resolve the ambiguity, we must look outside the text of the statute itself. We begin with the purpose of the statute.

The purpose of the mailing restrictions is

to reduce the advantage in elections that incumbent legislators previously enjoyed through mailings at public expense during the last year of their terms. This purpose is generally accomplished by limiting the number and kind of mailings that legislators may mail during that year.

Advisory Opinion 1995 - No. 19, p. 2.

The purpose of the mailing restriction statute is not achieved by applying it in this case to the December mailing. A legislator enjoys no advantage of incumbency in an election in which he or she is not a candidate. Unless and until a legislator is appointed or naturally approaches the last 12 months of his or her term, the mailing restrictions do not apply.

On the other hand, we will not look the other way when a legislator sends a mailing on the eve of his or her appointment. When a legislator has knowledge that he or she will be appointed, or the appointment is reasonably certain, then we will apply the mailing restrictions to any mailing sent during that time prior to his or her actual appointment. The critical point, for purposes of the mailing restrictions, is the point at which the legislator knows or reasonably should know that he or she will be appointed to another legislative seat. Prior to that point, we will not consider any of his or her mailings to be subject to the mailing restrictions of RCW 42.17.132.

In addition to the facts stated above, the Board notes that at the time of the mailing, news reports quoted then-Representative Jacobsen as being reluctant to even consider the appointment. This left some doubt as to who the nominees to the Council would be.

Under the circumstances, the December mailing by then-Representative Jacobsen will not count as one of two mailings of identical newsletters allowed during the remainder of now-Senator Jacobsen's current term.